REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 570 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER

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REPLY ARGUMENT

Nothing has been raised in the Appellees' brief which changes the argument or position of Appellant, but Appellant feels constrained to file an answer brief reaffirming its contentions and distinguishing the cases cited by the Union.

First, although the Union blows hot and cold on whether there was in fact a work stoppage, it cannot be denied in reality that a work stoppage did exist. In the first place, the Union for purposes of its Motion for Summary Judg-

ment admitted the allegations of the Complaint as true. Secondly, the District Court in fact found that there was a work stoppage (RT-16) (Appellees brief page 3 f.n.).

Secondly, the Appellee in its brief on page 9 states that Howard refused to go to arbitration. In point of fact this is incorrect, and further is no part of the record before this tribunal. The Union Affidavit referred to by Appellee does state that Howard first requested the Joint Conference Committee to meet and then later requested cancellation of said meeting. This is correct, but the events which transpired between the request and the cancellation are not before this tribunal and Howard in no respect can be said to have refused to go to arbitration. The matter on which Howard requested arbitration is quite different from the matter which is before this tribunal.

The ultimate issue in this case is and must be "Does the particular clause in the Howard contract allow the matter of violation of a no-strike clause to go to arbitration?" Every clause must be analyzed on its own merits.

> "We do not decide in this case that in those circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. *Drake Bakeries, Inc. v. Local* 50, *American Bakery and Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 265, 8 L.Ed.2d 474 (1962)

The Appellee contends that the present case falls within the guide lines of *Drake*. The Appellant contends our clause is far more restrictive. It is as easy as that.

Appellee cites three cases which it contends sustains its position. All three are easily distinguishable. *Desert Coca-Cola Bottling Co. v. General Sales Drivers,* 335F. 2d 198 (9th Cir. 1964) and *Operating Engineers, Local 3 v. Crooks Bros. Tractor Company* 205F. 2d 282 (7th Cir. 1961) are easily distinguished. These cases did not involve a violation of the no-strike clause, but the interpretation of in one case the word "wages" and in the other the word "qualifications". The Court of Appeals in both cases held that the issue as to whether wages were involved in one case, and qualifications in the other was questionable. The words "wages" and "qualifications" were susceptible to different interpretations and whether overtime was to be considered wages or insubordination bore on qualifications was unclear. Hence, the Court was uncertain as to whether or not the particular fact situation was to be excluded from the arbitration procedure. But it is clear that if the Court was convinced that wages or qualifications were involved, it would abide by the collective bargaining agreement and forbid arbitration. See *United Aircraft Corporation v. Lodge* 971 *of the International Association of Machinists,* 360 F.2d 150 (5th Cir. 1966).

In our case, there is no question that a stoppage of work did occur. Howard so alleges, the Union concedes this and the District Court so found as pointed out earlier. Thus, we are not involved in the situation of *Desert* or *Crook* where the court is uncertain as to whether wages or qualifications are involved. Here, it is clear that a work stoppage occurred and thus these two cases are completely inapplicable. The only question in our case is "Is it the intent of Article I, Section 4 that the matter of an admitted work stoppage be submitted or excluded from arbitration. Howard contends that based on the reasons set forth

in its original brief it has been clearly shown that the parties did not intend this matter to go to arbitration.

Pietro Scalzitti Company v. International Union of Operating Engineers, 351 F.2d 576 (7th Cir. 1966) cited by Appellee may be distinguished based on the distinction between the particular contract clauses. The clause in this case differs greatly from the one in the Howard contract in that the wording reads "There shall be no stoppage of work until, etc." In our case, the wording is far more restrictive, i.e., there shall be no stoppage of work *because of a dispute.*

In summary, this court must determine this case based on our particular contractual provisions. Appellant could cite numerous cases since *Drake* in which the court has said the clause in the particular contract does not intend arbitration, i.e., see *Boeing Company v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* 370 F.2d 969 (3rd Cir. 1967) wherein the Court inferred from the fact the arbitration clause was geared to employee grievances that it was not intended that a violation of the no-strike clause was arbitrable and see also *District* 50, *United Mine Workers of America, et al. v. Chris-Craft Corporation,* 385 F.2d 946 (6th Cir. 1967) wherein the contract contained an exclusionary clause regarding discharge because of a work stoppage. In the *Chris-Craft* case, the Court distinguished *Los Angeles Bag Co. v. Printing Specialties, etc.,* 345 F.2d 757 (9th Cir. 1965) based on the fact that in that case there was a factual dispute concerning whether an unauthorized work stoppage had in fact incurred, whereas in the *Chris-Craft* case it was admitted, and secondly, the *Los Angeles* case contained a general clause providing for arbitration of differences arising out of the interpretation, application

or violation of the express provisions of the agreement, whereas in *Chris-Craft* the clause was not so broad. Both distinctions are applicable to the present case. The Court in *Chris-Craft* said that a Court is not free to ignore the plain wording of the agreement and where the Court is convinced that a subject was not intended to be arbitrated, it should so rule.

And so this Court must of necessity focus on the particular wording of the Howard contract "There shall be no stoppage of work because of a dispute". Can it be said that under this wording the parties meant to submit the matter of a work stoppage to arbitration? Howard contends it is clear that this was not the intent of the contract, for to do so would render this clause meaningless as pointed out in our original brief. Further, subsequent clauses namely Article I, Section 9, providing for conditions prevailing prior to the time a dispute arose remaining unchanged and Article II, Section 15 Paragraph 2 where it is stated that in the event of dispute the workmen shall remain at their work, substantiate this interpretation.

CONCLUSION

Other cases relating to this issue are helpful to the court, but no other case can be determinative in that the ultimate determination in each case must rest on the particular contract clause. The guide lines set down in *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 8 L.Ed.2d 462 (1962) and *Drake* must be used to set the framework for each particular determination. It is Howard's position that a reading of the Howard contract will make it clear

that the parties meant to exclude violations of the no-strike clause from the arbitration process.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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Three copies of this brief mailed this 21st day of June, 1968, to:

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